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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Communications Assistance	)	CC Docket No. 97-213
for Law Enforcement Act	)	

COMMENTS OF BELL ATLANTIC MOBILE, INC.

BELL ATLANTIC MOBILE, INC.

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Bell Atlantic Mobile, Inc. ("BAM"), submits these initial comments on the Commission's Notice of Proposed Rulemaking[1] to implement the Communications Assistance for Law Enforcement Act ("CALEA").[2] BAM urges the Commission to simplify its proposed recordkeeping burdens on carriers, and fulfill its duty to address the serious problems resulting from the October 1998 and January 1995 deadlines governing CALEA's capability requirements.

SUMMARY

BAM is one of the nation's largest providers of commercial mobile radio service, serving subscribers in nineteen states and the District of Columbia. BAM has supplied ongoing assistance to law enforcement personnel who are authorized to conduct electronic surveillance. Many BAM employees regularly work with

[1]Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking, FCC 97-356, released October 10, 1997 ("Notice").

[2]Pub. L. No. 103-414, 108 Stat. 4279 (1994).

federal, state and local law enforcement agencies, and BAM continues to spend considerable resources to help in those agencies' surveillance efforts. BAM is fully committed to fulfilling all of its new obligations under CALEA. But it disagrees with the Notice's approach to implementing that statute.

The Notice (at ¶ 1) states that "this proceeding focuses on the responsibilities imposed specifically upon the Commission by CALEA." Unfortunately, the Notice is both overinclusive and underinclusive, and thus fails to offer proposals which would correctly implement the Commission's CALEA responsibilities. It proposes unnecessary new recordkeeping and reporting rules which would burden carriers without achieving CALEA's goals.

In contrast, the Notice does not take up the Commission's responsibility to consider whether the October 1998 deadline for carriers to meet certain CALEA obligations should be extended. A request concerning that deadline was filed over four months ago. It is already clear that the deadline is not technically feasible and must be extended. The Commission should do so in this proceeding, not defer it to some unspecified future time.

The Commission also does not take up the serious problem created by the January 1, 1995 date for determining which equipment upgrades will be entitled to reimbursement. Congress and the Commission have encouraged carriers to make huge investments in building and upgrading networks over the past three years, and carriers have done so. But, because of the unexpectedly long delay in the standard-setting process, carriers are faced with having to retrofit three years

of investments, a result which would conflict with the intent of CALEA, as well as potentially harm competition and consumers. The Commission must also take up the critical issue of compensation for post-January 1995 upgrades.

I. THE PROPOSED RECORDKEEPING AND DISCLOSURE RULES ARE UNNECESSARY AND EXCESSIVE.

The Notice primarily addresses (1) which carriers are to be subject to the new rules (¶¶ 10-20), and (2) proposals for the new rules themselves (¶¶ 21-38).

BAM agrees with the Notice that CALEA obligations should apply to all telecommunications carriers as that term is proposed to be defined in new Section 64.1702(a). Both CALEA and its legislative history support this definition. All providers of commercial mobile radio service are subject to CALEA, and the rule should so state. The rule should also explicitly state that resellers are covered. There is no basis for exempting some types of CMRS providers or resellers, since all are engaged in the provision of telecommunications as that term is defined in CALEA and in the Communications Act.

BAM does not, however, agree with the Notice's rulemaking proposals for carrier recordkeeping and reporting, which would micromanage carrier procedures without any commensurate benefit to CALEA's objectives. CALEA authorizes the Commission to "prescribe such rules as are necessary" to implement the Act.[3] The Notice, however, ignores this important condition, and merely states that CALEA

[3] 47 U.S.C. § 229(a) (emphasis added).

"directs the Commission to prescribe rules." The distinction is important. Before the Commission can adopt a rule, it must find that the rule is in fact necessary. The Notice does not acknowledge this requirement. Perhaps for this reason, it proposes excessive and burdensome rules that are not needed to implement the goals of CALEA.

The Commission has recognized that "all regulation necessarily implicates costs, including administrative costs, which should not be imposed unless clearly warranted."[4] Carriers which are forced to bear the costs of new regulation may be forced to divert capital from infrastructure investment or other productive use, or may seek to pass those costs on in the form of higher prices to customers. New rules should thus not be imposed unless they are shown to be clearly necessary -- and CALEA's direction is entirely consistent with this measured approach to new regulation. The Notice, however, is not.

Carrier Liability (¶ 27.) The Notice improperly asks for comment as to whether CALEA "extends vicarious criminal and civil liability to a carrier" for unauthorized interceptions. The Commission has no authority to address or decide this issue. Determining "vicarious" liability is not within the scope of its rulemaking authority under CALEA. Moreover, determinations of what conduct constitutes a federal crime must be made by Congress, not the Commission. In fact, Congress has already enacted numerous provisions which impose both

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[4]Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455, 18464 (1994).

criminal and civil liability for unauthorized electronic surveillance.[5] The extent to which carriers may be liable for the unauthorized actions of their employees is for Congress to decide, and should not be addressed in this proceeding.

Reporting of Unauthorized Surveillance (¶ 27). The Notice asks for comment on an FBI proposal to require breaches of carrier security procedures to be reported to the Commission. Nothing in CALEA supports such a requirement, and there is no logical reason why the FCC (rather than the law enforcement agency involved in the surveillance at issue) should be involved. This proposal would also create numerous, complex issues concerning, for example, how and to whom at the Commission the breach is reported, what information is provided, and how confidentiality is to be preserved. Depending on the circumstances, such security breaches may be reported to the law enforcement agency involved in the particular surveillance, but an across-the-board disclosure requirement to the Commission is bureaucratic overkill.

Carrier Security Policies (¶¶ 29-30). The Notice first acknowledges, "The legislative history of CALEA contains no congressional finding that existing law is inadequate to protect citizen privacy and security rights against improper surveillance." It thus proposes a new rule, Section 64.1703, which would simply

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[5]See, e.g., Section 705 of the Communications Act, 47 U.S.C. § 705, prohibiting persons assisting in transmission of wire or radio communication from divulging or publishing the contents of the communication except where authorized by Title 18; 18 U.S.C. § 2511 (conduct of unauthorized surveillance is a felony); 47 U.S.C. § 2520 (creating civil cause of action against person engaging in unauthorized surveillance).

require carriers to adopt and maintain internal security policies that fully meet the statutory requirements which carriers must meet in setting up wiretaps or other electronic surveillance. This rule is appropriate because it will ensure that all facilities-based carriers and resellers develop policies to ensure that CALEA's privacy interests are protected.

Affidavits and Recordkeeping (¶¶ 31-32). The Notice then, however, reverses course, ignoring the Congressional finding that existing law has been adequate, and proposes extensive and complex new law. Proposed new Section 64.1704(c) would require that each employee engaged in interception activity must prepare and sign a detailed affidavit, prior to their involvement in an interception. The Notice also proposes that the carrier assemble and keep this same information as part of the new recordkeeping requirements. Given that the carrier will keep records of the surveillance pursuant to Section 105 of CALEA in any event, forcing employees to prepare separate affidavits serves no purpose. This requirement would be totally redundant and should not be adopted.

The detailed list of carrier recordkeeping requirements (proposed Section 64.1704(a)) is itself unnecessary. It is appropriate for a carrier to record the telephone numbers and circuit identification numbers involved, and the start and stop times and dates of the interception. But there is no need for a carrier to record the identity of the law enforcement officer presenting the authorization, the name of the judge or prosecuting attorney signing the authorization, and the other information proposed to be included by the rule. If needed, this information can

be found on the face of the court order. The Notice also supplies no explanation as to why requiring this burdensome procedure will achieve any CALEA objective, and it thus fails to meet Congress' requirement that the Commission impose only such rules "as are necessary" to implement CALEA.

Document Retention (¶ 32). The Notice proposes a new rule, Section 64.1704(b), to require carriers to keep interception records for ten years. Nothing in CALEA imposes a recordkeeping obligation on carriers, and there is no rational basis for a ten-year period. Law enforcement agencies are already obligated by law to keep records for ten years. 18 U.S.C. § 2518. Adding a duplicative retention obligation on carriers is completely unnecessary.

Employee Designations (¶ 33). The Notice asks for comment on a proposal to require carriers to identify "designated" and "non-designated" employees, to have "designated employees" keep "separate records," and to comply with other burdensome procedures. CALEA does not require such designations, and there is no need for them. BAM's internal procedures ensure that only those employees who are fully trained in the obligations imposed by federal and state wiretap laws participate in surveillance efforts. Security personnel work in many different locations in many states. For security reasons, the authorization is received in a central location by trained employees who maintain the records and notify those other employees who will assist in implementing the interception. Only trained employees in the central location have access to the records of the interceptions. Recording the names of all personnel involved in performing, supervising and

internally authorizing the interception and the names of those who possessed knowledge of the interception would be unduly burdensome and would serve no useful purpose. BAM already has detailed procedures in place to ensure that only trained personnel assist in interceptions.

II. THE OCTOBER 1998 COMPLIANCE DATE MUST BE EXTENDED.

Section 111 of CALEA generally requires that telecommmunications carriers comply with the capability requirements imposed by Section 103 of the statute within four years after CALEA's enactment date, that is, by October 25, 1998. Section 107(c), however, authorizes the Commission to extend this date when it determines compliance is "not reasonably achievable through application of technology available within the compliance period."

The Notice acknowledges that in July 1997, the Commission received a petition from the Cellular Telecommunications Industry Association ("CTIA") which requested that the Commission extend the October 1998 deadline for complying with the capability requirements for two years.[6] The CTIA Petition demonstrated that, given disputes between carriers and the FBI over the precise capability standards that should be adopted and the FBI's proper role in the standard-setting process, it was already impossible for carriers to meet the

[6]Cellular Telecommunications Industry Association, Petition for Rulemaking, filed July 18, 1997. CTIA also requested that the Commission establish capability standards which would meet the requirements of Section 103, pursuant to its authority granted by CALEA Section 107(b).

October 1998 deadline. Without standards in place, manufacturers could not develop new equipment, and until that equipment is available, carriers could not install it. Although the Telecommunications Industry Association (TIA) last week adopted what was termed an "interim" capability standard, it is far too late to meet the October 1998 deadline. Based on BAM's own discussions with equipment vendors as to lead times required to design capability-compliant equipment, and the additional time needed to install the equipment and make other capability-related network changes, the October 1998 deadline is clearly not achievable.

Inexplicably, the Notice fails to address the CTIA Petition and thus fails to commence the proceeding CTIA requested on extending the October 1998 deadline. The Notice's terse explanation is that "this proceeding is to focus on obligations assigned specifically to the Commission by CALEA" (¶ 44). It thus defers CTIA's request to a later proceeding (one which has still not been opened). This is not a proper rationale for not acting in this proceeding, because addressing the compliance deadline is also an obligation "assigned specifically to the Commission by CALEA." The Notice's indefinite deferral of the critical compliance deadline issue will only impose additional burdens on the Commission, by leaving carriers who cannot meet the deadline with no choice but to file numerous extension petitions. The deadline is only months off. The Commission should not consider any recordkeeping requirements without also taking up its now its authority and obligation to address the compliance deadline.

III. THE PROBLEMS CAUSED BY THE JANUARY 1995 DATE SHOULD BE ADDRESSED NOW.

The Commission must also implement its responsibility under Section 109(b) to decide whether carriers should be required to bear the costs of retro-fitting equipment installed after January 1, 1995. That section provides that the Commission shall determine whether "compliance with the assistance capability requirements of section 103 is reasonably achievable with respect to any equipment, facility or service installed or deployed after January 1, 1995." If compliance for equipment installed after that date is not reasonably achievable, carriers are not required to install such equipment unless they are reimbursed for the costs of compliance.

When Congress enacted CALEA in 1994, it set the January 1, 1995 date on the assumption that capability standards would soon be adopted, and thus that carriers installing equipment in 1995 and later would generally have to incur the costs of making it CALEA-compliant. That assumption would have proven correct if carriers had in fact been able to purchase CALEA-compliant equipment as they upgraded and expanded their networks.

Instead, however, no capability standard was adopted until the TIA published an interim standard just one week ago, more than three years after the law's passage. In those three years, Congress and the Commission, through spectrum auctions, market-opening initiatives in the 1996 Act, and other actions, encouraged the telecommunications industry to make enormous investments in

their networks -- and the industry did just what Congress and the Commission wanted. Hundreds of new telecommunications carriers have been licensed to provide PCS and other wireless services, or have entered the local exchange market as resellers and CLECs, and these carriers have invested hundreds of millions of dollars in their new networks. Existing carriers have similarly been investing enormous sums to upgrade their networks to provide new services to the public. BAM, for example, has made huge investments in digital cellular technology to bring its customers state of the art mobile capabilities and features.

None of these carriers, however, have been able to buy equipment that complies with CALEA capability standards, because those standards have not existed. They now face the prospect of having to make substantial additional investments in retrofitting the networks they have just completed building or upgrading. The 1995 date, which might have been reasonable had carriers been able to obtain CALEA-compliant equipment shortly after that date, has become an arbitrary and unreasonable albatross, which will take money that would otherwise go to efforts to compete in the telecommunications market and to further improve carriers' service to customers. This is not what Congress intended.

The Notice (at ¶¶ 45-48) devotes much attention to the factors that the Commission might consider in the future in responding to Section 109(c) petitions. But this exclusive focus on procedure fails to tackle the real, substantive problem the Commission must address now -- the adverse public policy implications for competition and consumers of requiring carriers to pay for retrofitting all

equipment installed during the past three years. The Commission is empowered under Section 109 with broad authority to alleviate these problems. Section 109 allows it to address the extent to which carriers should retrofit post-January 1, 1995 equipment by considering a wide range of factors, including the impact of compliance costs on carriers and their customers, and also "such other factors as the Commission determines are appropriate." Taking up this critical issue now will avoid the burden the Commission will face in having to address the numerous individual Section 109 petitions which will otherwise inevitably be filed. The Commission should act on its responsibility under Section 109 to determine whether carriers should be reimbursed for the costs of equipment installed after January 1, 1995.

CONCLUSION

The Notice advances unnecessary recordkeeping proposals that would burden carriers, but postpones the agency's obligation to address the serious problems created by the October 1998 and January 1995 capability dates. The Commission should adopt minimal rules that ensure carriers have security procedures to achieve CALEA's privacy and other objectives, but which do not micromanage those procedures. It should also take up, in this proceeding, an

extension of the October 1998 compliance deadline, as well as compensation to carriers for the costs of upgrading equipment installed after January 1995.

Respectfully submitted,

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